

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

DEREK SINCERE BLACK WOLF CRYER,

Plaintiff,

v.

C.A. No. 05-11289-RCL

KATHLEEN M. DENNEHY, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S APPEAL AS UNTIMELY

Defendants, through counsel, hereby move that this Court to dismiss plaintiff's appeal as untimely, pursuant to Fed. R. App. P. 4(a)(1)(A) and 4(c), and 28 U.S.C. § 2107. In support of their motion, defendants state as follows:

1. The pro se plaintiff, Derek Sincere Black Wolf Cryer ("Cryer"), brought this civil action in June, 2004.

2. Defendants' motion to dismiss was granted on August 22, 2007 (Lindsay, J.), and final judgment was entered on that date.

3. Pursuant to Fed. R. App. P. 4(a)(1)(A) and 4(c), and 28 U.S.C. § 2107, because the instant action is a civil case, the defendants are not officers of the United States or an agency of the United States, and Cryer is an inmate, Cryer was required to deposit his notice of appeal in the prison's internal mail system within thirty (30) days of the date of final judgment, or by September 21, 2007.

4. Cryer's notice of appeal, dated October 3, 2007, was filed with the U.S. District Court on October 5, 2007. Because the notice of appeal is dated October 3, 2007, it is clear that Cryer

failed to deposit his notice of appeal in the prison's internal mail system within thirty (30) days of the August 22, 2007 judgment, as required under Fed. R. App. P. 4(a)(1)(A) and 4(c), and 28 U.S.C. § 2107.

5. The taking of an appeal within the prescribed time is "mandatory and jurisdictional." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982); Bowles v. Russell, 127 S. Ct. 2360, 2363 (2007). "When an 'appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.'" Bowles v. Russell, 127 S. Ct. at 2366, quoting United States v. Curry, 47 U.S. 106, 113 (1848).

Accordingly, Cryer's appeal of the August 22, 2007 decision dismissing the complaint should be dismissed as untimely under Fed. R. App. P. 4(a)(1)(A) and 4(c), and 28 U.S.C. § 2107.

Dated: October 16, 2007

Respectfully submitted,

NANCY ANKERS WHITE
Special Assistant Attorney General

/s/ Richard C. McFarland
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CERTIFICATE OF SERVICE

I, Richard C. McFarland, counsel for Defendants Kathleen M. Dennehy, Michael Thompson, Gregory McCann, Tina Ranno, Mae Robinson, Gregory Poladian, Thomas Lavelle and William Taylor, hereby certify that on this 16th day of October, 2007, I served a copy of the Defendants' Motion To Dismiss Plaintiff's Appeal As Untimely, by first class mail, postage prepaid, upon: Derek Sincere Black Wolf Cryer, Plaintiff, at his address, Souza-Baranowski Correctional Center, Harvard Road, P.O. Box 8000, Shirley, MA 01464.

/s/ Richard C. McFarland
Richard C. McFarland

